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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1464

STATE OF ILLINOIS,

Petitioner,

v.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

MOTION OF PLAINTIFFS' CERTIFIED CLASS REPRESENTATIVES IN:

FOLDING CARTON ANTITRUST LITIGATION, MDL 250 (N. D. ILL.)

CORRUGATED CONTAINER ANTITRUST LITIGATION, MDL 310 (S. D. TEX.)

HEDGES ENTERPRISES, INC. v. CONTINENTAL GROUP, INC., ET AL., CIVIL NO. 78-1254 (E. D. PA.)

FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI, AND BRIEF AMICI CURIAE.

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TABLE OF CONTENTS.

Page

Motion of Certified Class Representatives to File a Brief *Amici Curiae* in Support of the Petition for Certiorari .. 1

Brief of Certified Class Representatives as *Amici Curiae* in Support of the Petition for Certiorari 7

A. The Interests Asserted by the *Amici* 8

B. Argument 9

1. The Seventh Circuit Did Not Address the Central Issue Presented of Whether a Federal Statute Has Actually Preempted the Federal Common Law 10

2. Statutory Preemption Creates a Discriminatory, Irrational and Arbitrary Impact on Courts and Litigants 12

3. The Seventh Circuit Erred in Deciding Congress Intended to Preempt Federal Common Law ... 15

4. The Seventh Circuit Misconstrued the Proper Role of the Federal Judiciary 16

C. Conclusion 17

TABLE OF CITATIONS.

Cases: Page

Aronson v. Quick Point Pencil Co., 47 U. S. L. W. 4219 (U. S., Feb. 28, 1979) 11

Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U. S. 313 (1971) 4

Corrugated Containers Antitrust Litigation, MDL No. 310 (S. D. Tex.), 80 F. R. D. 244 (S. D. Tex. 1978) .....1, et seq.

Folding Carton Antitrust Litigation, MDL No. 250 (N. D. Ill.), 75 F. R. D. 727 (N. D. Ill. 1977) .....1, et seq.

Hedges Enterprises, Inc. v. Continental Group, Inc., Civil No. 78-1254 (E. D. Pa.), 1979-1 CCH Trade Cases ¶ — (E. D. Pa. Feb. 6, 1979) .....1, et seq.

Illinois v. City of Milwaukee, 406 U. S. 91 (1972) 3, 9, 10, 11, 15, 16

Lawlor v. National Screen Service Corp., 349 U. S. 322 (1955) 13

Nashville Milk Co. v. Carnation Co., 355 U. S. 373 (1958) .3, 12, 13

Parklane Hosiery v. Shore, 99 S. Ct. 645 (1979) ...4, 9, 10, 11, 13, 14

State of Illinois v. General Paving Company and F. F. Mengel Company, No. 78-1479 (7th Cir. Jan. 9, 1979) 2, 3, 5, 9, 10, 14, 16

United States v. Continental Group, Inc., 456 F. Supp. 704 (E. D. Pa. 1978) 8

United States v. Consolidated Packaging Corporation, 575 F. 2d 117 (7th Cir. 1978) 8

TABLE OF CITATIONS (Continued).

Statutes: Page

Clayton Act:

Generally 12, 13

15 U. S. C. § 12 ..... 3, 4

15 U. S. C. § 15 8

15 U. S. C. § 16(a) 2, 3, 4, 5, 10, 12, 13, 14, 15

Federal Trade Commission Act, 15 U. S. C. § 45 13

Sherman Act:

Generally 12, 13

Section 1 ..... 8, 14

Wilson Tariff Act of 1914:

Generally 12, 13

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HEDGES ENTERPRISES, INC. v. CONTINENTAL GROUP, INC., ET AL., CIVIL NO. 78-1254 (E. D. PA.)

FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI.

The undersigned class representatives, on behalf of the certified classes of plaintiffs in:

Folding Carton Antitrust Litigation, MDL 250 (N. D. Ill.);

Corrugated Container Antitrust Litigation, MDL 310 (S. D. Tex.);

Hedges Enterprises, Inc. v. Continental Group, Inc., et al., Civil No. 78-1254 (E. D. Pa.)

respectfully move, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, for leave to file a brief as *amici curiae* in support of the Petition for Certiorari filed by Petitioner, the Illinois Attorney General, herein. The Illinois Attorney General, Petitioner, and General Paving Company, Respondent, have consented to the filing of the brief of *amici curiae*. Respondent F. F. Mengel Company has not consented.

In support of this Motion, *amici curiae* state:

1. The United States Court of Appeals for the Seventh Circuit has ruled on an extremely important federal question in *State of Illinois v. General Paving Company and F. F. Mengel Company*, No. 78-1479 (7th Cir. Jan. 9, 1979) [hereinafter *Illinois v. General Paving*]. The Seventh Circuit decided that the statutory provision of 15 U. S. C. § 16(a) providing for prima facie use of certain prior judgments preempts the federal common law remedy of collateral estoppel use of prior judgments.

2. The decision in *Illinois v. General Paving* should be reviewed by the Court for two fundamental reasons not addressed in the Petition for Certiorari and which are addressed in the attached brief of *amici curiae*. *Amici curiae* respectfully suggest that by granting them leave to file the attached brief, the Court will be assisted significantly in passing upon the following issues:

A. Whether the Seventh Circuit's decision in *Illinois v. General Paving* is in direct conflict with this Court's decision in *Illinois v. City of Milwaukee*, 406 U. S. 91, 104-107 (1972), which established the rule for determining when a federal statute has preempted the federal common law. The Seventh Circuit acknowledged that the issue before it was statutory preemption of the federal common law, *see Illinois v. General Paving*, Appendix A to the Petition at A-6, n. 4. However, the Seventh Circuit did not discuss any principle for deciding when preemption should be deemed to have occurred. It did not cite *Illinois v. City of Milwaukee, supra*, or indeed any other legal authority, on this central issue. Under the standards articulated by the Court in *Illinois v. City of Milwaukee, supra*, and other decisions, preemption of the federal common law by the statute clearly has *not* occurred, because there is no inconsistency or conflict in applying the statute and the federal common law of collateral estoppel. The above argument is set forth more fully in the attached brief of *amici curiae*.

B. Second, whether the effect of the decision by the Seventh Circuit in *Illinois v. General Paving* is to create an irrational scheme of selective, piecemeal preemption. *Amici curiae* respectfully suggest that the Seventh Circuit's opinion did not adequately consider the consequences of its holding that statutory preemption had occurred. The statute at issue, 15 U. S. C. § 16(a), by its terms can only apply to prior judgments prosecuted by the United States Government under the specific "antitrust laws", as defined in 15 U. S. C. § 12, which judgments are then sought to be used by other parties in subsequent proceedings also pursuant to the same "antitrust laws." See *Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, 375 (1958) for definition of the specific "antitrust laws." According to the Seventh Circuit, in the above situation collateral estoppel may *never* be invoked. But in all circumstances not governed by 15 U. S. C. § 16(a), the federal common law must necessarily apply. As examples, 15 U. S. C. § 16(a) permits collateral estoppel to be applied on a discretionary basis to a judgment prosecuted by the United States Government under any *statute* other than the "antitrust laws," which is then invoked by a party in a subse-

quent proceeding under the "antitrust laws." The statute also permits collateral estoppel to be applied to a judgment prosecuted by a *party* other than the United States Government (even if prosecuted under the "antitrust laws"), and sought to be used by another party in a subsequent proceeding under the "antitrust laws." Categorically excluding collateral estoppel in the one situation above when the statute applies, but permitting it on a discretionary basis in the other two when the statute does not apply, is irrational. It furthers no policy of either Congress or the federal judiciary. It actively frustrates the intent of Congress as expressed in the legislative history of 15 U. S. C. § 16(a). It also actively frustrates the judicial policy articulated in *Parklane Hosiery v. Shore*, 99 S. Ct. 645 (Jan. 9, 1979) and *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U. S. 313 (1971) that needless relitigation should be avoided, and that collateral estoppel should be applied whenever it is inherently fair to the party sought to be estopped to do so. Under the Seventh Circuit's decision, this consideration of inherent fairness can not be considered for a certain class of judgments, and the wholly extraneous and irrelevant factors of *who* prosecuted the prior judgment (whether the United States or not) and under what *laws* those judgments were obtained (whether under the "antitrust laws" of 15 U. S. C. § 12 or not) determine whether collateral estoppel may be invoked. The above argument is set forth more fully in the attached brief by *amici curiae*.

3. The decision by the Seventh Circuit in *Illinois v. General Paving* also deserves review by the Court because it is in conflict with the statutory language and history of 15 U. S. C. § 16(a), and amendments thereto, which evidence a Congressional desire to *benefit* private antitrust plaintiffs, and not, as is the effect of the Seventh Circuit's

decision, to place a discriminatory burden on those plaintiffs not shared by any other category of litigants in the federal courts: the *per se* inability to use a prior Government judgment for collateral estoppel purposes.

Interest of the Amici.

Amici curiae, as private businesses, are among the intended beneficiaries of the private treble damage remedy of the antitrust laws, and as such are greatly prejudiced by the decision in *Illinois v. General Paving*. In each action in which the class representatives are parties plaintiff, at least one party defendant has either been criminally convicted of violating Section 1 of the Sherman Act in an indictment charging the existence of a horizontal price-fixing conspiracy or is presently standing trial on an indictment charging such a conspiracy, which may lead to a criminal judgment of conviction. The Seventh Circuit's *Illinois v. General Paving* decision holds that such final judgments of conviction are excluded from collateral estoppel treatment. This holding controls in the *Folding Carton Antitrust Litigation*, MDL 250 (N. D. Ill.), and carries persuasive effect as the only appellate ruling on this issue in *Corrugated Container Antitrust Litigation* MDL 310 and *Hedges Enterprises, Inc. v. Continental Group Inc.*, Civil No. 78-1254 (E. D. Pa.).

Wherefore, movants respectfully request that the Court grant them leave to file the attached brief in Support of the Petition for Certiorari.

Respectfully submitted,

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AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI.

A. THE INTERESTS ASSERTED BY AMICI CURIAE.

Amici curiae are class representatives on behalf of the certified classes of private, non-governmental plaintiffs in the *Folding Carton Antitrust Litigation*, MDL No. 250 (N. D. Ill.), *see* 75 F. R. D. 727 (N. D. Ill. 1977), the *Corrugated Container Antitrust Litigation*, MDL No. 310 (S. D. Tex.), *see* 80 F. R. D. 244 (S. D. Tex. 1978), and *Hedges Enterprises, Inc. v. Continental Group, Inc.*, Civil No. 78-1254 (E. D. Pa.), *see* 1979-1 CCH Trade Cases ¶ — (E. D. Pa. Feb. 6, 1979).

Amici curiae are private businesses who have brought suit pursuant to Section 4 of the Clayton Act for treble damages and injunctive relief to halt a nation-wide horizontal price fixing conspiracy on the part of the manufacturers of folding cartons, corrugated containers and consumer bags, respectively, and to compensate them for damages they have sustained as victims thereof. *Amici curiae*, as private businesses, are among the intended beneficiaries of Section 4 of the Clayton Act. *See H. R. Rep. No.* 627, 63rd Cong. 2d Sess. (1914); *S. Rep. No.* 698, 63rd Cong. 2d Sess. (1914).

They are vitally affected by the question presented in the Petition for Certiorari. In two of their three respective actions defendants have previously been convicted of criminal violations of Section 1 of the Sherman Act in indictments charging the existence of horizontal price fixing conspiracies. *See United States v. Consolidated Packaging Corporation*, 575 F. 2d 117 (7th Cir. 1978) (folding cartons); *United States v. Continental Group, Inc.*, 456 F. Supp. 704 (E. D. Pa. 1978) (consumer bags). In the third action, defendants are currently standing trial on an indictment charging a horizontal price fixing conspiracy, which trial may result in criminal judgments of convictions. *United States v. International Paper Co., et al.*, Criminal No. 78-H-11 (S. D. Texas) (corrugated containers). *Amici curiae* seek to assert, and should be entitled to assert, the collateral estoppel effect of final judgments of conviction under the federal common law of collateral estoppel. The decision of the United States Court of Appeals for the Seventh Circuit for which a Writ of Certiorari is presently sought erroneously denies *amici curiae* any possibility for collateral estoppel use of the facts found by the juries which convicted or which might convict defendants of the very acts upon which amici have sued those same defendants. In the *Folding Cartons Antitrust Litigation* that decision is controlling authority. On February 16, 1979, Judges Robson and Will entered an Order foreclosing collateral estoppel in the *Folding Carton* litigation because of *Illinois v. General Paving*. In the *Corrugated Containers Antitrust Litigation* and the *Hedges Enterprise* case, *Illinois v. General Paving* is the only appellate precedent directly on point to which district courts may look for guidance, if not instruction. The Seventh Circuit's decision in *Illinois v. General Paving* will have vast implications nationwide for private enforcement of the antitrust laws.

B. ARGUMENT.

The Seventh Circuit, in *Illinois v. General Paving*, has ruled upon an extremely important federal question in a manner that directly conflicts with the rule for determining when a federal statute has preempted the federal common law, enunciated by the Court in *Illinois v. City of Milwaukee*, 406 U. S. 91, 101-07 (1972). It also conflicts with the language, history and policies of the antitrust statutes, and with the *Parklane Hosiery* decision, *Parklane Hosiery v. Shore*, 99 S. Ct. 645 (1979). For these reasons, the Petition for a Writ of Certiorari should be granted.

1. The Seventh Circuit Did Not Correctly Address the Central Issue Presented of Whether a Federal Statute Has Actually Preempted the Federal Common Law.

The legal issue presented is whether a federal statute has preempted the federal common law. The statute in question is § 5(a) of the Clayton Act, 15 U. S. C. § 16(a). The federal common law is the doctrine of collateral estoppel, as clarified most recently by *Parklane Hosiery v. Shore*, 99 S. Ct. 645 (1979).

The United States Court of Appeals for the Seventh Circuit recognized that the issue of statutory preemption of federal common law had been presented. ". . . Section 5(a) was intended to preempt the common law of collateral estoppel." *Illinois v. General Paving*, Appendix A to Petition for a Writ of Certiorari at A-6 n. 4.

However, in deciding that issue, the Court of Appeals did not purport to apply, and did not in fact apply the rule enunciated by this Court for determining when federal common law has been preempted by a federal statute. The Court of Appeals' decision of preemption is in the strongest possible conflict with the most recent decision by the Court on the question of federal common law preemption, *Illinois v. City of Milwaukee*, 406 U. S. 91 (1972).

In *Illinois v. Milwaukee, supra,* at issue was whether the federal common law of nuisance abatement had been preempted by the Federal Water Pollution Control Act. The Court unanimously held there had been no such preemption:

> The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 457, 1 L. Ed. 2d 972, 981, 77 S. Ct. 912.

406 U. S. at 103. *See id.* at 107.

The correct focus for determining preemption, according to *Illinois v. Milwaukee, supra,* is whether the federal common law and the federal statute are "inconsistent" with each other. *Id.* at 104. The Court in *Illinois v. Milwaukee* found no inconsistency in application, and held that the federal common law remedy supplemented and complemented the statutory one. *See* the similar analysis in *Aronson v. Quick Point Pencil Co.*, 47 U. S. L. W. 4219, 4221 (U. S., Feb. 28, 1979), (no actual conflict between federal patent law and private royalty contract, hence no preemption).

The Seventh Circuit in *General Paving* never addressed the question whether, under *Illinois v. City of Milwaukee,* the federal common law of collateral estoppel and the statutory prima facie use provision are "inconsistent" with each other. Had it done so, it would have had to conclude that there is no inconsistency. Quite the contrary, the two uses supplement each other. Offensive collateral estoppel is generally applicable under the common law, upon consideration of the factors outlined by the Court in *Parklane Hosiery v. Shore, supra.*[1]

Whenever the *Parklane Hosiery* factors are not met and a trial court declines to permit application of collateral

1. Those factors are whether the party seeking to assert collateral estoppel could have joined in the prior proceeding, whether the party sought to be estopped had the incentive and opportunity to litigate the issue vigorously in the prior proceeding, whether the prior proceeding rendered a decision that was itself inconsistent with any earlier decisions in other forums, and whether the party sought to be estopped would have greater procedural opportunities to litigate the issue in the second proceeding than in the first. 99 S. Ct. at 648 n. 1.

estoppel—or when a party for strategic reasons finds it preferable to introduce evidence on all the issues, rather than having some of them precluded from re-litigation by estoppel—15 U. S. C. § 16(a) provides for according prima facie weight to a prior judgment.

Thus the common law and the statute complement each other, each filling a vital, non-duplicative and assuredly non-mutually-exclusive role in the private enforcement of the antitrust laws.

The central question of the proper legal standard for preemption was not considered by the Seventh Circuit Court of Appeals.

2. Statutory Preemption Creates a Discriminatory, Irrational, and Arbitrary Impact on Courts and Litigants.

The Seventh Circuit did not analyze the consequences of its finding of statutory preemption of the common law. Had it done so, it would have realized that preemption by § 16(a) will cause an irrational and arbitrary system of piecemeal preclusion, estoppel and litigation, which furthers no purpose of Congressional statute or judicial policy.

The Seventh Circuit decision held for statutory preemption of collateral estoppel to the extent that the statute authorizes *prima facie* use. The federal common law must still apply to all matters not statutorily preempted.

Section 16(a) is specific. It controls only the subsequent use of (1) a judgment obtained by the United States Government; (2) which has been obtained pursuant to the Sherman Act, the Clayton Act, or parts of the Wilson Tariff Act of 1914 and an amendment thereto [these are the exclusive "antitrust laws" of 15 U. S. C. § 16(a) as defined in 15 U. S. C. § 12, *see Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, 375 (1958)]; (3) which is subsequently sought to be used by another party in an

action pursuant to the Sherman Act, the Clayton Act, or parts of the Wilson Tariff Act of 1914 and an amendment thereto, the same "antitrust laws." The Court has noted the extremely selective nature of this definition of "antitrust laws". *Nashville Milk, supra* at 376 n. 4.

Therefore, under the Seventh Circuit's formulation, there is *one* circumstance in which collateral estoppel is categorically forbidden: a Government-obtained judgment under the three "antitrust laws" sought to be used by another party in a subsequent action also brought under the "antitrust laws." There are many other circumstances when there will be *no* preemption, because 15 U. S. C. § 16(a) can not apply, and common law collateral estoppel will be available under *Parklane Hosiery.*

For example, if a party *other* than the Government obtains the judgment in the first proceeding, there would be no preemption of the federal common law, because 15 U. S. C. § 16(a) only applies to judgments initially obtained by the Government. *See, e.g.*, the Court's decision in *Lawlor v. National Screen Service Corp.*, 349 U. S. 322 (1955), which considered at length the application of common law res judicata and collateral estoppel to a private antitrust action not brought by the Government. The Court assumed collateral estoppel and res judicata were available and not preempted.

Similarly, if the Government obtains a judgment under *another* statute besides the specific "antitrust laws," there would be no preemption, and the common law of collateral estoppel would apply, even though the second proceeding was itself based on the "antitrust laws." The most glaring such possibility would be an administrative finding by the Federal Trade Commission in a proceeding under § 5 of the F. T. C. Act, 15 U. S. C. § 45, that defendants had committed an unfair trade practice by conspiring to restrain trade or to fix prices. That finding, not

made under an "antitrust law," would estop relitigation of the issue in a private treble damage action. Under the Seventh Circuit rule, an identical criminal judgment finding could not be so used.

Identically, a prior Government judgment under the "antitrust laws" would be available to plaintiffs for collateral estoppel in any action under any law *other than* the federal "antitrust laws." For example, private plaintiffs could collaterally estop defendants from contesting the fact of their conspiracy on pendent state law counts in federal treble damage litigation. It is senseless to preclude estoppel on a private plaintiff's § 4 claims, while permitting estoppel on state law claims in the same action. These cases follow because 15 U. S. C. § 16(a) can only apply—and only preempt under *General Paving*—if *both* actions are pursuant to the "antitrust laws."

Ironically, the one situation categorically excluded from collateral estoppel under the *General Paving* decision —a Government judgment under the "antitrust laws" used by a subsequent party in a suit under the "antitrust laws" —is the one in which Congress actually sought to assist private litigants, not place them at a severe disadvantage. Moreover, it is precisely in the circumstance of a prior Government conviction, such as in *General Paving*, that the indicia of fairness and reliability for collateral estoppel effect under *Parklane Hosiery* are most likely to be present. See note 1 *supra*. It will almost always be a prior proceeding in which no private party could have joined. It will often have been a criminal proceeding, involving a great incentive to litigate[2] and a high standard of proof. To exclude categorically these actions disserves enforcement of the antitrust laws, and frustrates both the intended

2. Violations of the antitrust laws are now felonies carrying severe sentences of imprisonment and heavy fines. 15 U. S. C. § 1 (1978 Supp.)

effect of 15 U. S. C. § 16(a), and the policy of sparing the Federal Courts from needless relitigation of matters that have already been fully and fairly litigated.

3. The Seventh Circuit Erred in Deciding Congress Intended to Preempt Federal Common Law.

Instead of focusing on the inconsistency, or lack thereof, under *Illinois v. City of Milwaukee, supra,* between the federal common law and statutory provisions, the Seventh Circuit inferred that Congress intended to preempt the common law by passing 15 U. S. C. § 16(a). In this conclusion, the Court of Appeals seriously erred.

The statutory history of 15 U. S. C. § 16(a) contains not one shred of evidence of Congressional intent to displace, preempt, or repudiate the common law. See S. *Rep.* No. 698, 63rd Cong. 2d Sess. 10 (1914); *H. R. Rep.* No. 627, 63rd Cong. 2d Sess. 14 (1914); 51 Congressional Record 13851, 13853-57, 16276, 13900 (1914). The language of the statute enacted in 1914 does not state that it is intended to preempt the common law. Nor do the words or history of any amendments to § 16(a) that have been enacted since 1914.

There is simply no evidence that either the Congress which enacted 15 U. S. C. § 16(a), or any subsequent Congress which amended the statute, desired to foreclose common law developments and common law remedies that would evolve over time to become available to litigants in federal court. Without such evidence, there is no plausible basis for finding a Congressional intent to preempt the common law. This issue has been extensively addressed in the Petition for Certiorari, pp. 19-21.

Quite the contrary, the history of 15 U. S. C. § 16(a) and its amendments display the strong Congressional interest in *benefiting* private antitrust litigants. *See H. R. Rep.* No. 627, and S. *Rep.* No. 698, 63rd Cong. 2d Sess.

1914. The effect of *Illinois v. General Paving* frustrates this policy by placing a discriminatory burden on antitrust plaintiffs, *a burden not shared by any other class of private plaintiffs in the federal courts:* the *per se* unavailability of any collateral estoppel benefit from a prior judgment which the United States Government has obtained.

4. The Seventh Circuit Misconstrued the Proper Role of the Federal Judiciary.

The Seventh Circuit concludes its decision as follows: "If the *prima facie* evidence standard of Section 5(a) is to be changed, it is for Congress to do so." Appendix A to Petition for Writ of Certiorari at A-8. This conclusion begs the question. Obviously only Congress can change a statute. That has nothing to do with whether the federal judiciary, in the exercise of sound discretion, should apply existing and recognized judicial doctrines such as collateral estoppel where such common law remedies are independent of any statute. "The remedies which Congress provides are not necessarily the only federal remedies available." *Illinois v. City of Milwaukee, supra,* 406 U. S. at 103. Hence the premise for the Seventh Circuit's decision was incorrect.

C. CONCLUSION.

For the foregoing reasons, *amici curiae* respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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